Dayalan a/l Sathiamutty v Gleneagles Hospital (Kuala Lumpur) Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO WA-22NCVC-128–03 OF 2021
MOHD ARIEF J
1 SEPTEMBER 2023

Tort — Negligence — Medical negligence — Doctors provided treatment to Achilles tendinitis suffered by plaintiff — Plaintiff sued hospital and doctors for negligence when providing treatment, operation and related post-treatment — Whether doctors failed to give sufficient advice regarding risk of treatment — Whether doctors' actions were in accordance with practice accepted by responsible body of medical men skilled in that particular art — Whether doctors breached duty of care — Whether issue of causation fulfilled — Whether there was non-delegable duty or vicarious liability on part of hospital — Whether hospital breached duty of care — Whether damages proven — Whether plaintiff entitled to interest and costs — Whether claim should have been filed in sessions court

The present case concerned a medical negligence action filed by a patient ('the plaintiff') who suffered Archilles tendinitis against the hospital ('the hospital') where he received the relevant treatment as well as the doctors who were involved in providing the said treatment. In this respect, one Dr Chan was responsible for the surgery undertaken to repair the plaintiff's left Achilles tendon whilst another doctor known as Dr Benjamin treated the plaintiff's wound post-surgery. Since the condition of the plaintiff's wound had worsen, with the plaintiff's consent, Dr Benjamin had undertaken a debridement procedure. However, due to the plaintiff's financial difficulties, the plaintiff did not attend the relevant follow-up as suggested by Dr Benjamin. The plaintiff was then referred to other hospitals including Park Medical Center in which he underwent surgery to debride all necrotic tissues including skin, fat, tendon, and bone. Since then, the plaintiff's left heel had recovered partially. He now claimed that he suffered occasional pain and numbness in his left foot. The plaintiff filed action against the hospital, Dr Chan and Dr Benjamin for negligence occurred when they provided treatment to the Achilles tendinitis suffered by him, the operation and the related post-treatment. The plaintiff claimed that he was not given sufficient advice and information regarding: (a) the surgical intervention or conservative management of his Archilles tendon injury; (b) whether to undergo surgical intervention or conservative management of his post-surgical wound; (c) his diabetes and how it would affect his condition and treatment options; (d) the joint management options; and (e) the options available to him post-surgery and during recovery of the

wound and he was not given appropriate care by the defendants.

Held, allowing the plaintiff's claim against Dr Benjamin, and dismissing the plaintiff's claim against the hospital and Dr Chan with costs:

(1) The plaintiff had proven his claim solely against Dr Benjamin concerning the post-surgery care of the wound. The court found that Dr Benjamin had failed to discharge the duty of care that was reposed in him to act in the best interest of the plaintiff and to ensure that his actions were in accordance with a practice accepted by a responsible body of medical men skilled in that particular art. Dr Benjamin failed to provide or give appropriate or reasonable advice to the plaintiff to ensure that the wound was properly taken care of and failed to ensure that the appropriate and reasonable advice was given to him as to: (a) the options available post-surgery; and (b) the appropriate steps that should have been taken considering the plaintiffs medical history, his repeated injury, his condition and his diabetes (see paras 52–54).

(2) Dr Benjamin was aware of the existing health issue suffered by the plaintiff. As such, the failure of Dr Benjamin to ensure that sufficient steps were taken to address the condition of the wound did cause the damages to the plaintiff. It was wrong for Dr Benjamin to now point to the plaintiff's pre-existing health issues (ie that the plaintiff was a diabetic) to try to escape liability. The court was of the opinion that the issue of causation was fulfilled in the circumstances of this case. Further, the court agreed with the plaintiff's argument that part of the damages claimed by the plaintiff was foreseeable and not remote. The type of injury suffered, and part of the damages claimed by the plaintiff would have arisen naturally from the failure by Dr Benjamin to exercise care as elucidated earlier (see paras 94–96).

(3) The court found that Dr Chan did take careful consideration of the risks and did notify the plaintiff of these issues. The consent form, duly executed by the plaintiff, indicated that the alternatives, risks, benefits, and potential side effects were explained by Dr Chan to the plaintiff. These risks were highlighted and recorded in the handwritten notes kept by Dr Chan in the consent form. These notes indicated, on a balance of probabilities, that they were explained by Dr Chan to the plaintiff. Regarding the plaintiff's post-operation treatment, the court found that it was reasonable for Dr Chan to have referred the plaintiff to Dr Benjamin, who was a skin specialist, to undertake appropriate care for the wound. This was in line with the accepted medical opinion as seen in the opinion of Dr Gobinder Singh. In the circumstances, the court found that Dr Chan was not negligent as suggested by the plaintiff because his actions were in accordance with the practice accepted by a responsible

body of medical men skilled in that particular art as per the opinion of Dr Gobinder Singh (see paras 114, 117 & 121–122).

(4) The court found that the plaintiff had only consulted Dr Benjamin for the treatment of the wound after he had undertaken the debridement of the wound on 4 October 2019. The appointment with Dr Chan was not attended to by the plaintiff. The plaintiff decided to only see Dr Benjamin. The plaintiff did not seek Dr Chan's opinion and communications were solely with Dr Benjamin. Dr Chan only came into the picture again after the wound became necrosed especially on 29 November 2019. Dr Chan ought to be absolved of any blame because he was not told of the condition of the wound by the plaintiff and Dr Benjamin until it became too late. For the said reason, blame should be attributed to Dr Benjamin alone. The court therefore did not find that Dr Chan had breached any of his duty of care to the plaintiff either alone or jointly as suggested by the plaintiff (see paras 128–129 & 134).

(5) The evidence before the court showed that the actions of Dr Chan and Dr Benjamin were clinical judgments on the part of these doctors and did not fall within the category of cases where there may arise a non-delegable duty or vicarious liability on the hospital. Firstly, both Dr Chan and Dr Benjamin were not employees of the hospital, and the hospital could not direct or control their clinical opinions. Secondly, the option to choose doctor was left solely to the plaintiff. Finally, the court did not find this duty of care owed by the hospital was breached even if such a duty existed. The non-delegable duty was to ensure that the doctors appointed were competent and able to attend to the plaintiff's care. The court found that the defendants were competent doctors who could undertake the said task. The plaintiff had also not complained about the standard of care provided to him by any staff of the hospital or by the facilities provided therein. The cause of action was solely concerning the standard of care and the clinical duties exercised by Dr Chan and Dr Benjamin and this surely did not fall within the category of cases recognised to impose either vicarious liability or impose a non-delegable duty on the hospital (see paras 147–152).

(6) After considering the evidence, the court found that Dr Benjamin should be directed to pay the plaintiff the following: (a) hospital and medical expenses amounting to RM68,466.70; (b) travel expenses amounting to RM2,000; (c) cost of a maid amounting to RM2,400; and (d) general damages amounting to RM50,000. The court further ordered interest at the rate of: (i) 4%pa from 25 August 2020 to the date of realisation on the sum of RM72,886.70 (ie the total amount allowed by the court for the hospital and medical expenses, travel expenses and the cost of a maid);

A and (ii) 5%pa from the date of judgment to the date of realisation on the sum of RM50,000 (ie the general damages allowed by the court) (see paras 157 & 171).

(7) The court ordered costs to be subject to the scale provided for under O 59 r 3 of the Rules of Court 2012 in the sum of RM7,000 to be paid by Dr Benjamin to the plaintiff. The plaintiff was also directed to pay costs to the other defendants in the sum of RM7,000 each. These orders were subject to the required allocator. This would have been the costs payable in the lower courts (ie the sessions court) because the present claim should not have been filed in the High Court even if one were to follow the estimation suggested by the plaintiff, which was substantially less than RM1m. The practice of filing all such claims before the High Court should be stopped to prevent waste of judicial time in the superior courts (see paras 173–175 & 177–178).

[Bahasa Malaysia summary

Kes ini melibatkan tindakan kecuaian perubatan yang difailkan oleh seorang pesakit ('plaintif') yang mengalami tendinitis Archilles terhadap hospital ('hospital') di mana dia menerima rawatan yang berkaitan serta doktor-doktor yang terlibat dalam memberikan rawatan tersebut. Dalam hal ini, Dr Chan bertanggungjawab ke atas pembedahan yang dijalankan untuk membaiki tendon Achilles kiri plaintif manakala seorang lagi doktor dikenali sebagai Dr Benjamin merawat luka plaintif selepas pembedahan. Memandangkan keadaan luka plaintif semakin teruk, dengan persetujuan plaintif, Dr Benjamin telah menjalankan prosedur 'debridement'. Bagaimanapun, disebabkan masalah kewangan plaintif, plaintif tidak menghadiri rawatan susulan yang berkaitan seperti yang dicadangkan oleh Dr Benjamin. Plaintif kemudiannya dirujuk ke hospital-hospital lain termasuk Park Medical Center di mana dia menjalani pembedahan untuk membersihkan semua tisu nekrotik termasuk kulit, lemak, tendon, dan tulang. Sejak itu, tumit kiri plaintif telah pulih sebahagiannya. Dia kini mendakwa bahawa dia mengalami kesakitan dan kebas pada kaki kirinya sekali-sekala. Plaintif memfailkan tindakan terhadap hospital tersebut, Dr Chan dan Dr Benjamin kerana kecuaian yang berlaku apabila mereka memberikan rawatan kepada Achilles tendinitis yang dialaminya, pembedahan dan pasca rawatan yang berkaitan. Plaintif mendakwa bahawa dia tidak diberi nasihat dan maklumat yang mencukupi mengenai: (a) intervensi pembedahan atau pengurusan konservatif kecederaan tendon Archillesnya; (b) sama ada untuk menjalani intervensi pembedahan atau pengurusan konservatif bagi luka selepas pembedahannya; (c) diabetesnya dan bagaimana ia akan menjejaskan keadaan dan pilihan rawatannya; (d) pilihan pengurusan bersama; dan (e) pilihan yang ada kepadanya selepas pembedahan dan semasa pemulihan luka dan dia tidak diberi penjagaan yang sewajarnya oleh defendan-defendan.

Diputuskan, membenarkan tuntutan plaintif terhadap Dr Benjamin, dan menolak tuntutan plaintif terhadap hospital tersebut dan Dr Chan dengan kos: A

(1) Plaintif telah membuktikan tuntutannya hanya terhadap Dr Benjamin mengenai penjagaan luka selepas pembedahan. Mahkamah mendapati Dr Benjamin telah gagal menunaikan kewajipan berjaga-jaga yang diberikan kepadanya untuk bertindak demi kepentingan plaintif dan memastikan tindakannya mengikut amalan yang diterima oleh badan perubatan yang bertanggungjawab yang mahir dalam seni tertentu tersebut. Dr Benjamin gagal memberikan atau memberi nasihat yang sesuai atau munasabah kepada plaintif untuk memastikan bahawa luka tersebut dijaga dengan betul dan gagal memastikan bahawa nasihat yang sesuai dan munasabah diberikan kepadanya tentang: (a) pilihan yang ada selepas pembedahan; dan (b) langkah sewajarnya yang sepatutnya diambil dengan mengambil kira sejarah perubatan plaintif, kecederaan berulangnya, keadaannya dan diabetesnya (lihat perenggan 52–54). B C D

(2) Dr Benjamin menyedari tentang isu kesihatan sedia ada yang dialami oleh plaintif. Oleh yang demikian, kegagalan Dr Benjamin memastikan langkah yang mencukupi telah diambil untuk menangani keadaan luka tersebut telah menyebabkan kerugian kepada plaintif. Adalah salah bagi Dr Benjamin untuk kini membangkitkan isu kesihatan plaintif yang sedia ada (iaitu, bahawa plaintif adalah penghidap diabetes) untuk cuba melepaskan diri dari liabiliti. Mahkamah berpendapat bahawa isu sebab musabab telah dipenuhi dalam keadaan kes ini. Selanjutnya, mahkamah bersetuju dengan hujah plaintif bahawa sebahagian daripada kerugian yang dituntut oleh plaintif adalah boleh dijangka dan tidak jauh. Jenis kecederaan yang dialami, dan sebahagian daripada ganti rugi yang dituntut oleh plaintif akan timbul secara semula jadi daripada kegagalan Dr Benjamin untuk menjalankan tanggungjawab berjaga-jaganya seperti yang dijelaskan sebelum ini (lihat perenggan 94–96). E F G

(3) Mahkamah mendapati Dr Chan telah mengambil kira risiko dengan teliti dan memberitahu plaintif tentang isu-isu ini. Borang kebenaran, yang disempurnakan dengan sewajarnya oleh plaintif, menunjukkan bahawa alternatif, risiko, faedah, dan kesan sampingan yang berpotensi telah dijelaskan oleh Dr Chan kepada plaintif. Risiko ini telah diserlahkan dan direkodkan dalam nota tulisan tangan yang disimpan oleh Dr Chan dalam borang kebenaran tersebut. Nota-nota ini menunjukkan, di atas imbangan kebarangkalian, bahawa ia telah dijelaskan oleh Dr Chan kepada plaintif. Mengenai rawatan selepas pembedahan plaintif, mahkamah mendapati adalah munasabah untuk Dr Chan merujuk plaintif kepada Dr Benjamin, yang merupakan pakar kulit, untuk menjalankan penjagaan yang sewajarnya bagi luka tersebut. Ini adalah selaras dengan pendapat perubatan yang diterima seperti yang boleh dilihat dalam pendapat Dr Gobinder Singh. Dalam keadaan itu, H I

mahkamah mendapati bahawa Dr Chan tidak cuai seperti yang dicadangkan oleh plaintif kerana tindakannya adalah mengikut amalan yang diterima oleh badan perubatan yang bertanggungjawab yang mahir dalam seni tersebut mengikut pendapat Dr Gobinder Singh (lihat perenggan 114, 117 & 121–122).

(4) Mahkamah mendapati plaintif hanya berunding dengan Dr Benjamin untuk rawatan luka selepas beliau melakukan 'debridement' luka pada 4 Oktober 2019. Temu janji dengan Dr Chan tidak dihadiri oleh plaintif. Plaintif memutuskan untuk berjumpa Dr Benjamin sahaja. Plaintif tidak meminta pendapat Dr Chan dan komunikasi hanya dengan Dr Benjamin. Dr Chan hanya muncul dalam gambaran sekali lagi selepas luka tersebut menjadi nekrosis terutamanya pada 29 November 2019. Dr Chan sepatutnya dibebaskan daripada apa-apa kesalahan kerana dia tidak diberitahu tentang keadaan luka tersebut oleh plaintif dan Dr Benjamin sehingga ianya sudah terlambat. Atas sebab tersebut, kesalahan harus dikenakan kepada Dr Benjamin sahaja. Oleh itu mahkamah tidak mendapati Dr Chan telah melanggar mana-mana kewajipan berjaga-jaganya kepada plaintif sama ada secara bersendirian atau bersama seperti yang dicadangkan oleh plaintif (lihat perenggan 128–129 & 134).

(5) Keterangan di hadapan mahkamah menunjukkan bahawa tindakan Dr Chan dan Dr Benjamin adalah keputusan klinikal di pihak doktor-doktor ini dan tidak termasuk dalam kategori kes di mana mungkin timbul kewajipan yang tidak boleh diwakilkan atau liabiliti vikarius ke atas hospital. Pertama, kedua-dua Dr Chan dan Dr Benjamin bukan pekerja hospital tersebut, dan hospital tersebut tidak boleh mengarahkan atau mengawal pendapat klinikal mereka. Kedua, pilihan untuk memilih doktor diserahkan sepenuhnya kepada plaintif. Akhirnya, mahkamah tidak mendapati kewajipan berjaga-jaga hospital ini dilanggar walaupun kewajipan sedemikian wujud. Kewajipan yang tidak boleh diwakilkan adalah bertujuan untuk memastikan bahawa doktor-doktor yang dilantik adalah cekap dan mampu menjalankan penjagaan ke atas plaintif. Mahkamah mendapati defendan-defendan adalah doktor-doktor yang cekap yang boleh menjalankan tugas tersebut. Plaintif juga tidak mengadu tentang standard penjagaan yang diberikan kepadanya oleh mana-mana kakitangan hospital atau oleh kemudahan yang disediakan di dalamnya. Kausa tindakan adalah semata-mata mengenai standard penjagaan dan tugas klinikal yang dilaksanakan oleh Dr Chan dan Dr Benjamin dan ini pastinya tidak termasuk dalam kategori kes yang diiktiraf untuk mengenakan liabiliti vikarius atau mengenakan kewajipan yang tidak boleh diwakilkan ke atas hospital tersebut (lihat perenggan 147–152).

(6) Selepas mempertimbangkan keterangan, mahkamah mendapati Dr

Benjamin perlu diarahkan membayar plaintif seperti berikut: (a) perbelanjaan hospital dan perubatan berjumlah RM68,466.70; (b) perbelanjaan perjalanan berjumlah RM2,000; (c) kos pembantu rumah berjumlah RM2,400; dan (d) ganti rugi am berjumlah RM50,000. Mahkamah selanjutnya memerintahkan faedah pada kadar: (i) 4% setahun dari 25 Ogos 2020 hingga tarikh realisasi ke atas jumlah RM72,886.70 (iaitu amaun yang dibenarkan oleh mahkamah untuk perbelanjaan hospital dan perubatan, perbelanjaan perjalanan dan kos pembantu rumah); dan (ii) 5% setahun dari tarikh penghakiman hingga tarikh realisasi ke atas jumlah RM50,000 (iaitu jumlah ganti rugi am yang dibenarkan oleh mahkamah) (lihat perenggan 157 & 171).

(7) Mahkamah memerintahkan kos tertakluk kepada skala yang diperuntukkan di bawah A 59 k 3 Kaedah-Kaedah Mahkamah 2012 dalam jumlah RM7,000 yang perlu dibayar oleh Dr Benjamin kepada plaintif. Plaintif juga diarah membayar kos kepada defendan-defendan lain dengan jumlah RM7,000 setiap seorang. Perintah-perintah ini tertakluk kepada alokator yang diperuntukkan. Ini sepatutnya merupakan kos yang perlu dibayar di mahkamah rendah (iaitu, mahkamah sesyen) kerana tuntutan semasa tidak sepatutnya difailkan di Mahkamah Tinggi walaupun mengikut anggaran yang dicadangkan oleh plaintif, yang sebahagian besarnya kurang daripada RM1 juta. Amalan memfailkan semua tuntutan sedemikian di hadapan Mahkamah Tinggi harus dihentikan untuk mengelakkan pembaziran masa kehakiman di mahkamah atasan (lihat perenggan 173–175 & 177–178).]

Cases referred to

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331; [1995] 4 CLJ 283, FC (refd)

Bonnington Castings Ltd v Wardlaw [1956] 1 All ER 615, HL (refd)

CNZ (suing by her father and litigation friend) v Royal United Hospitals Bath NHS Foundation Trust and another [2023] EWHC 19 (KB), KBD (refd)

Chung Lian Kok lwn South East Asia Insurance Bhd [2011] MLJU 636; [2011] 1 LNS 980, HC (refd)

Datuk Bandar Dewan Bandaraya Kuala Lumpur v Ong Kok Peng & Anor [1993] 2 MLJ 234, SC (refd)

Dominic Puthucheary & Ors (personal representatives of the estate of Thayalan a/l Kanapathipillai) v Dr Goon Siew Fong & Anor [2007] 5 MLJ 552; [2007] 5 CLJ 38, CA (refd)

Dr Hari Krishnan & Anor v Megat Noor Ishak bin Megat Ibrahim & Anor and another appeal [2018] 3 MLJ 281, FC (refd)

Emeh v Kensington and Chelsea and Westminster Area Health Authority [1984] 3 All ER 1044, CA (refd)

Farraj and another v King's Healthcare NHS Trust and another [2010] 1 WLR 2139, CA (refd)

A *Foo Fio Na v Dr Soo Fook Mun & Anor* [2007] 1 MLJ 593; [2007] 1 CLJ 229, FC (refd)
Griffiths v TUI UK Ltd [2021] EWCA Civ 1442, CA (folld)
Guan Soon Tin Mining Co v Wong Fook Kum [1969] 1 MLJ 99, FC (refd)
B *Janagi a/p Nadarajah (joint estate administrator and dependent of Benedict a/l Thanilas, deceased) & Anor v Sjn Razali bin Budin & Ors* [2022] 8 MLJ 820; [2021] 10 CLJ 915, HC (refd)
Ku Jia Shiuen (an infant suing through her mother and next friend, Tay Pei Hoon) & Anor v Government of Malaysia & Ors [2013] 4 MLJ 108, HC (refd)
C *Montgomery v Lanarkshire Health Board (General Medical Council intervening)* [2015] 2 All ER 1031, SC (refd)
NKX (by his mother and litigation friend) v Barts Health NHS Trust [2020] EWHC 828 (QB), QBD (refd)
Norazleen bt Mohammed Mustaffa v Dr Omar Md Isa & Anor [2015] MLJU 2313; [2015] 4 CLJ 474, CA (refd)
D *Sambaga Valli a/p KR Ponnusamy v Datuk Bandar Kuala Lumpur & Ors and another appeal* [2018] 1 MLJ 784, CA (refd)
Sivakumaran & Ors v Yu Pan & Anor [1995] 1 MLJ 12; [1994] 4 CLJ 1066, HC (refd)
E *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229, FC (refd)
Vincent Manickam s/o David (suing by himself and as administrator of the estate of Catherine Jeya Sellamah, deceased) & Ors v Dr S Hari Rajah & Anor [2018] 2 MLJ 497; [2017] 8 CLJ 27, CA (refd)
Webster (by his mother and litigation friend, Heather Butler) v Burton Hospitals F *NHS Foundation Trust (2017)* [2017] EWCA Civ 62, CA (refd)
Wilsher v Essex Area Health Authority [1988] 1 All ER 871, HL (refd)
Wisniewski v Central Manchester Health Authority [1996] 7 Med LR 248 (refd)
Woodland v Swimming Teachers Association and others [2014] AC 537, SC (refd)
G *Wu Siew Ying t/a Fuh Lin Bud-Grafting Centre v Gunung Tunggal Quarry & Construction Sdn Bhd & Anor* [2011] 2 MLJ 1, FC (refd)
Zulhasnimar bt Hasan Basri & Anor v Dr Kuppu Velumani P & Ors [2017] 5 MLJ 438; [2017] 8 CLJ 605, FC (refd)

H **Legislation referred to**

Rules of Court 2012 O 59 r 3
Courts of Judicature Act 1964
Subordinate Courts Act 1948

I *MS Dhillon (with Aaika Zulaika) (PS Ranjan) for the plaintiff.*
Felix Raj (with Joseph Lum) (Felix Raj Chambers) for the first defendant.
Nurulhuda Mansor (with Christal Wong and Jesryna Patel) (Shearn Delamore & Co) for the second defendant.
Sharmini Navaratnam (Siva Dharma & Assoc) for the third defendant.

Mohd Arief J:

INTRODUCTION

[1] The plaintiff alleges that the defendants were negligent when they had provided treatment to the Achilles tendinitis suffered by him sometime in July 2019, the operation and the related post-treatment.

SUMMARY OF THE APPLICABLE LAW

[2] I will now deal with the applicable legal principles.

[3] The applicable law when dealing with allegations of negligence against hospitals and doctors is trite. I will attempt to summarise the applicable law in the following paragraphs before I deal with the present claim pleaded by the plaintiff against the defendants.

[4] I summarise the current legal position as follows:

(a) a doctor or any medical practitioner owes a duty of care to his or her patient that must be discharged in 'accordance with a practice accepted by a responsible body of medical men skilled in that particular art';

(b) a doctor or any medical practitioner is not guilty of negligence if he or she has acted in accordance with such a practice even if there exists a body of opinion that takes a contrary view;

(c) the said doctor or any medical practitioner also owes a duty of care to his or her patient to warn his patient of the material risk inherent in the treatment that is being proposed. This duty has been described as 'the right of self-determination'. The 'Court will decide whether a patient has been properly advised of the risks associated with the treatment and no longer look at what a body of respectable members of the medical profession would do as a yardstick';

(d) what a material risk will depend on the circumstances of the case and 'whether a reasonable person in the patient's position would be likely to attach significance to the risk';

(e) the medical practitioner is 'duty bound by law to inform his or her patient, who is capable of understanding and appreciating such information of the risks involved in any proposed treatment' to enable the patient to make an election of whether to proceed with the proposed treatment with knowledge of the risks involved or decline to be subjected to such treatment; and

(f) this does not however mean that this court is bound by the opinion, or the practice accepted by the medical profession. If the 'body of medical opinion does not withstand logical analysis, the court may hold that it is not reasonable or responsible and may then depart from it'.

[5] These principles of law have been gleaned from the following authorities:

(a) *Foo Fio Na v Dr Soo Fook Mun & Anor* [2007] 1 MLJ 593; [2007] 1 CLJ 229;

(b) *Zulhasnimar bt Hasan Basri & Anor v Dr Kuppu Velumani P & Ors* [2017] 5 MLJ 438; [2017] 8 CLJ 605; and

(c) *Dr Hari Krishnan & Anor v Megat Noor Ishak bin Megat Ibrahim & Anor and another appeal* [2018] 3 MLJ 281.

[6] Regarding hospitals, it is also trite that whether the hospital would be vicariously liable for the alleged acts of the doctor or medical practitioner will depend on the facts of each case. I also note that there exist cases where the hospital could be found liable for the acts of the doctors even if these doctors are independent contractors.

[7] This will arise where it is shown that the actions of the doctors fall into a category of circumstances where it is shown that the hospital owed a non-delegable duty to the patient for the care and procedure adopted by the doctor.

[8] I find much assistance in reading the judgment of Lord Sumption in *Woodland v Swimming Teachers Association and others* [2014] AC 537 where he explained that the courts have chosen to extend the duty of care to even work, or conduct undertaken by independent contractors where it is shown either:

(a) where it is shown that the work undertaken, although not inherently hazardous but due to public policy and the possible exceptional danger to the public such a duty is imposed vicariously (eg, work undertaken by independent contractors on behalf of public utility providers); and

(b) where it is shown that there exists: (i) an antecedent relationship between the defendant and the claimant; (ii) the duty is a positive or affirmative duty to protect a particular class of persons against particular risks, and not simply a duty to refrain from acting in a way that foreseeably causes injury; (iii) the duty arises by virtue of the relationship personal between the claimant and the defendant; and (iv) the claimant has no control as to how the defendant chooses to discharge those obligations. The work may be delegable, but the duty remains that of the defendant. This arises

where the claimant is in the custody, charge or care of the defendant and it is natural that the duty to protect the claimant will be imputed on the defendant.

[9] I also refer to *Farraj and another v King's Healthcare NHS Trust and another* [2010] 1 WLR 2139, *Vincent Manickam s/o David (suing by himself and as administrator of the estate of Catherine Jeya Sellamah, deceased) & Ors v Dr S Hari Rajah & Anor* [2018] 2 MLJ 497; [2017] 8 CLJ 27 and *Datuk Bandar Dewan Bandaraya Kuala Lumpur v Ong Kok Peng & Anor* [1993] 2 MLJ 234.

[10] I must also address my mind as to whether the injury or damage claimed by the plaintiff arose because of the defendants' alleged negligence.

[11] It is for the plaintiff to prove that but for the negligent medical treatment or negligent advice by the defendants, the injury to the plaintiff would not have occurred.

[12] To quote Lord Bridge in *Wilsher v Essex Area Health Authority* [1988] 1 All ER 871, it must be shown by the plaintiff that the defendant's negligence 'had materially contributed to the pursuer's injury'. Also refer to *Dominic Puthucheary & Ors (personal representatives of the estate of Thayalan a/l Kanapathipillai) v Dr Goon Siew Fong & Anor* [2007] 5 MLJ 552; [2007] 5 CLJ 38. This would depend on the medical evidence presented and the circumstances of each case.

FACTS OF THIS CASE

[13] The plaintiff is a director within the employment of KPMG Management & Risk Consulting Sdn Bhd ('KPMG') at the time of the injury.

[14] He attended an event organised by KPMG held on 6 July 2019 and suffered an injury to his left Achilles heel. He had suffered an injury to the same area before and did undertake surgery to repair the same.

[15] I note that the plaintiff is a diabetic and was under the care of Dato Dr Faridah at the material time.

[16] Due to the recurring Achilles heel injury, the plaintiff sought treatment at the first defendant's premises ('hospital') on 6 July 2019. He had sought treatment and asked to be referred to a sports medicine specialist doctor within the ranks of the said hospital.

[17] The hospital gave the plaintiff the names of the doctors who had an

A interest in sports medicine who were stationed there. The plaintiff agreed to appoint the second defendant ('Dr Chan') as the consultant to ascertain the nature of his injury and treat the same. The hospital had suggested the name of the on-call doctor but was refused by the plaintiff and he chose Dr Chan after being given the list of doctors available at the hospital.

B

[18] The plaintiff executed the agreement contained in the admission form dated 6 July 2019. The terms of which need not be reproduced herein but I note that the hospital emphasises cl 4 of the said agreement.

C **[19]** Dr Chan did not immediately decide to undertake surgery to repair the Achilles tendon. The plaintiff was first admitted for elevation and cryotherapy as well as anti-inflammatory medication. The plaintiff was also referred to Dato Dr Faridah to control the plaintiff's sugar level which was found to be unsatisfactory at the material time.

D

[20] From 6 July 2019 to 9 July 2019, the plaintiff was treated with cyrocruff to reduce the swelling around the area where the surgery was undertaken.

E **[21]** The plaintiff was eventually advised by Dr Chan to undertake surgery to repair his left Achilles tendon. According to Dr Chan, the risks relating to the said operation were explained to the plaintiff.

[22] Dr Chan also suggests that the possible alternatives were also explained F to the plaintiff which includes passive treatment of the injury and the possible side effects of not undertaking treatment as suggested. These allegations are denied by the plaintiff and will be dealt with in detail in the following paragraphs.

G **[23]** I do note however that the plaintiff did agree to the 'Informed Consent for Procedure/Surgery' issued by the hospital which contains the following:

> 2. I acknowledge that the doctor as signed below has explained to me that the surgery, care, treatment, special diagnostic ... procedures may carry the risk of unsuccessful results, complications, injury or even death ... and no warranty or H guarantee is made as to a result or cure. I have been informed of:
>
> — The nature and purpose of care, treatment, services, medications, interventions or procedure.
>
> — Potential benefits, risks, or side effects, including potential problem related to I recuperation.
>
> — The likelihood of achieving care, treatment or service goals.
>
> — Reasonable alternatives to proposed care, treatment and service.
>
> — Relevant risks, benefits and side effects to alternatives ...

[24] I also note that the following also appears in the said document:

> Nature and purposes of the procedure I surgery, the benefits and risks of the operation or procedure, the possibilities of complications, and the alternatives to this operation or procedure and their risks and benefits as stated below, have been explained to the patient spouse ...
>
> — Bleeding
>
> — Infection
>
> — Mortality
>
> — Others
>
> — Wound breakdown high risk (handwritten by Dr Chan)
>
> — Nerve/Blood Vessel injury (handwritten by Dr Chan)

[25] The records indicate that the operation undertaken on 9 July 2019 went well.

[26] The plaintiff was kept in the hospital for post-operation care until his eventual discharge on 26 July 2019.

[27] During his stay at the hospital, the following issues arose:

(a) on 11 July 2019, Dr Chan noted that the plaintiff suffered 'mild ishemic wound' and Dr Chan took measures to address this issue;

(b) despite treatments suggested by Dr Chan, the plaintiffs wound broke down on 13 July 2019 as seen in the stale blood discharge from the said wound. Dr Chan directed for antibiotics to be consumed by the plaintiff and for the wound to be treated with ice treatment;

(c) on 15 July 2019 the plaintiff developed a low-grade fever; and

(d) during this period, the records indicate that medication was given to the plaintiff and constant care to the wound was administered by Dr Chan and the attending nurses. Dr Chan had directed the use of Aquacel Ag and Opsite Dressing on the wound.

[28] Due to the issues concerning the said wound, Dr Chan decided to refer the plaintiff to the second defendant, Dr Benjamin George ('Dr Benjamin'), the plastic surgeon. Dr Benjamin saw the plaintiff on 19 July 2019.

[29] With the additional assistance of Dr Benjamin, wound dressing was done daily, and Dr Benjamin had undertaken drainage of superficial hematoma on the wound on 22 July 2019 and 26 July 2019.

A **[30]** As stated earlier, the plaintiff was discharged on 26 July 2019 and told to rest at home. Specific instructions were also given to the patient to attend further follow-up at the hospital.

B **[31]** The plaintiff came to the hospital for follow-up on 31 July 2019, 2 August 2019, 4 August 2019, 12 August 2019, 18 August 2019, 21 August 2019, 23 August 2019, 27 August 2019, 28 August 2019, 30 August 2019, 4 September 2019, 6 September 2019, 12 September 2019, 8 September 2019, 20 September 2019, 25 September 2019 and 2 October 2019. During these visits, he was treated either by Dr Benjamin or Dr Chan.

C

[32] The plaintiff's dressing was also attended to by the nurses from the hospital on 6 August 2019, 18 August 2019, 23 August 2019, 28 August 2019, 8 September 2019, 12 September 2019 and 20 September 2019.

D

[33] I note that on 10 August 2019, the plaintiff was seen by Dr Chan. Dr Chan directed the dressing to be changed and for the use of Aquacel Ag with gauze. The plaintiff was also directed to attend the hospital again on 2 August 2019. The plaintiff did not attend the required follow-up on 2 August 2019.

E

[34] The plaintiff did come to the hospital on 10 August 2019 and was seen by Dr Chan.

F **[35]** It was during the plaintiff's session with Dr Benjamin on 2 October 2019, that it was decided that the plaintiff needed to undergo a debridement procedure due to the condition of the wound.

[36] The plaintiff was admitted on 4 October 2019 to undertake the said G treatment. It was noted in the doctor's assessment report that the main complication was the unhealed wound at the plaintiff's left ankle that required debridement.

H **[37]** The surgical procedure was undertaken by Dr Benjamin on 4 October 2019 and the plaintiff had consented to the procedure being undertaken. The purpose of the procedure and the risk relating to the said procedure as seen in the standard form was explained to the plaintiff by Dr Benjamin.

I **[38]** The plaintiff was discharged on 5 October 2019 and was directed to attend follow-up treatment on 7 October 2019 and 9 October 2019.

[39] Unfortunately, due to the plaintiff's financial difficulties, he did not attend the said follow-up treatment as suggested by Dr Benjamin.

[40] The plaintiff had been advised to ensure that his dressing to the wound is regularly changed, and that care was taken to ensure that the wound does not deteriorate.

[41] The plaintiff had undertaken dressing to his wound either on his own or at a private clinic of his own choice. He did not attend the hospital or meet Dr Chan or Dr Benjamin until 14 October 2019. In the meantime, the plaintiff communicated with Dr Benjamin and sent pictures of his wound through WhatsApp messages. I note that this communication started in late July 2019 to late December 2019 where pictures of the plaintiff's wound were shared with Dr Benjamin.

[42] As stated earlier, the plaintiff did attend Dr Benjamin's clinic on 14 October 2019 to have the wound dressing changed and the wound cleaned.

[43] Dr Benjamin was away on 1 November 2019 as he was overseas, and the plaintiff's wound was attended to by the nurses at the hospital. The wound was also attended to by the nurses on 4 November 2019, Dr Benjamin carried out the dressing on 20 November 2019 and 6 December 2019.

[44] Dr Benjamin became concerned with the condition of the wound when the plaintiff attended his clinic on 20 November 2019. He decided to discuss this issue with Dr Chan, and both concluded that, although the plaintiff's surrounding skin to the wound may have improved there is a possibility that the tendon was left exposed that may require treatment,

[45] After a discussion was undertaken between Dr Benjamin and Dr Chan, it was decided that the plaintiff be informed of the possibility that a second opinion be obtained from Dr Kuladeva Ratnan, a consultant plastic surgeon from Pantai Hospital, Kuala Lumpur This was suggested to the plaintiff by Dr Benjamin and was agreed to by the plaintiff.

[46] Dr Chan had seen the plaintiff on 29 November 2019 and his notes indicate that the wound had also broken down and that the Achilles tendon and sutures used to repair the damage earlier may have broken down. Dr Chan, however, did not inspect the wound on this date as the plaintiff only wanted to inform him that he may be seeing Dr Kula for a second opinion. Dr Chan did not object to the said notification.

[47] The plaintiff went to Pantai Hospital at the suggestion of Dr Benjamin and met Dr Kula on 19 December 2019, The legible notes of Dr Kula states:

> Achilles sutures exposed. No skin cover over the area. Dry gangrene.

A Diabetes — 12 years. According to Patient well controlled. Patient referred to Dr Asraff

[48] The plaintiff then went to Subang Jaya Medical Center for a third opinion and was seen by one Dr Rusdi. He was then referred to Park Medical B Center under the care of Dr Yeap and Dr Yeoh.

[49] A debridement of the wound was undertaken at Park Medical Center and various procedures were taken from 8 January 2010 to 13 February 2020. C He was attended to by Dr Yeoh which led to surgery to debride all necrotic tissues including skin, fat, tendon, and bone. Partial raising of the sural island flap on the wound was also undertaken.

[50] The plaintiff was last seen by Dr Yeoh on 25 August 2020. His left heel D has since recovered partially and claims that he now suffers from occasional pain and numbness in his left foot.

SUMMARY OF THE PLAINTIFFS CLAIM

E **[51]** The plaintiff's claim against the defendants could be summarised as follows:

(a) that he was not given sufficient and/or adequate advice and information regarding the surgical intervention or conservative management of his F Achilles tendon injury;

(b) that he was not given sufficient and/or adequate advice and information on whether to undergo surgical intervention or conservative management of his post-surgical wound;

G (c) that he was not given sufficient and/or adequate advice and information regarding his diabetes and how it would affect his condition and treatment options;

(d) that he was not sufficiently advised regarding the joint management H options; and

(e) that he was not appropriately advised concerning the options available to him post-surgery and during recovery of the wound and was not given appropriate care by the defendants.

I DECISION OF THIS COURT

[52] After considering the evidence presented before this court and the submissions filed by parties, I find that the plaintiff has proven his claim solely against Dr Benjamin concerning the post-surgery care of the wound.

[53] I find that Dr Benjamin had failed to discharge the duty of care that is reposed in him to act in the best interest of the plaintiff and to ensure that his actions are in accordance with a practice accepted by a responsible body of medical men skilled in that particular art.

[54] I also find that Dr Benjamin did not provide or give appropriate or reasonable advice to the plaintiff to ensure that the wound was properly taken care of and failed to ensure that the appropriate and reasonable advice was given to him as to the: (i) the options available post-surgery; and (ii) the appropriate steps that should have taken taking into account the plaintiffs medical history, his repeated injury, his condition and his diabetes.

[55] Regarding the other defendants, I do not find that the plaintiff has proven his claim against them and therefore dismiss the same with costs.

[56] My reasons for coming to the above position are contained in the following paragraphs.

DETAILED REASONS FOR LIABILITY AGAINST DR BENJAMIN AND DISMISSING THE CLAIM AGAINST THE OTHER DEFENDANTS

Claim against Dr Benjamin (third defendant)

Failure to provide adequate care and advice by Dr Benjamin

[57] Dr Benjamin was brought into the picture at the suggestion of Dr Chan. This is due to Dr Benjamin's expertise as a plastic surgeon and to ensure that the best interest of the patient is addressed through a doctor who is trained within the required or specialised area of medicine concerning skin and wounds.

[58] It is therefore incumbent for Dr Benjamin to ensure that the plaintiffs wound is given sufficient attention because: (i) the plaintiff had suffered a similar injury before the operation; and (ii) he had serious diabetes issues that may have serious repercussions to the healing of the wound.

[59] I have considered the medical notes of Dr Benjamin and find that the notes were relatively bare and did not contain sufficient details as to the advice that should have been given to the plaintiff. There was no detailed explanation as to the nature of the care given or the options that should have been given to the plaintiff. He merely noted that the dressing was done to the wound when the plaintiff had the opportunity to visit him and when there was a need to undertake the debridement of the wound as stated earlier.

[60] There was no discussion or any notation as to the nature of the status of the wound in detail, the health of the plaintiff, his diabetes and how it could affect the healing of the wound and what precautions the plaintiff should have undertaken at the material time.

[61] What I find more disturbing is that when the plaintiff was unable to attend the hospital for further treatment due to his financial difficulties, Dr Benjamin only continued to have discussions with the plaintiff through WhatsApp messages alone and by way of pictures of the wound shared through the said mobile application.

[62] More so when I consider the pictures taken, especially those from 1 November 2019 to 14 December 2019 indicate that the said wound has deteriorated substantially and there was a need for the said wound to be treated by a sufficiently trained physician or a specialist. It should not have been left for discussion merely through WhatsApp messages. I believe a reasonably trained physician would have ensured that proper advice be given to a patient to have the wound seen by a doctor to enable the wound to be touched and physically seen by a doctor. This kind of treatment should not have been left solely by way of WhatsApp messages as undertaken by Dr Benjamin.

[63] My views are reinforced by the opinion of Dr Gobinder Singh, the second defendant's expert, who states that by the end of August 2019, based on the WhatsApp messages, the wound did deteriorate, and he would have been worried about the state of affairs at the material time.

[64] He also opined that if it was his patient, he may have 'pushed the plastic surgeon into the theatre with him', Nonetheless, it is worth noting that Dr Gobinder Singh did qualify these statements that he is unable to ascertain the true nature of the wound unless he was able to touch, see, and even smell the said wound.

[65] I also find it disconcerting that Dr Benjamin did not offer any real options to the plaintiff, especially the option to undertake surgery to ensure that the wound is taken care of. At the very least, at the stage when the wound appears to be necrosis or in dire need of care as of 1 November 2019, Dr Benjamin should have immediately directed the plaintiff to see Dr Chan or himself immediately to have the wound treated or at least see another doctor with similar expertise. He should at least tell the plaintiff to visit a government hospital to have the wound looked at and have appropriate treatment.

[66] The serious condition of the plaintiff was ignored, and the notes indicate that Dr Benjamin may have worked on the wrong assumption that the wound would heal naturally and that all was well. I find that this is further

aggravated by the fact that these discussions were simply undertaken through WhatsApp messages where the condition of the wound could not have been ascertained and tested. This conduct I find falls below the standard expected of a competent medical practitioner.

[67] To be clear, I find that the turning point where Dr Benjamin became negligent and failed to discharge his duties arose sometime after 1 November 2019. The pictures shared in the WhatsApp messages by the plaintiff solely to Dr Benjamin, show that the wound is deteriorating. I believe that a reasonably competent medical practitioner would have been concerned with the wound and taken immediate action to either direct the plaintiff to see him or advise the appropriate steps to seek a doctor to care for the wound even from a government hospital.

[68] The nature of the injury, and the health of the patient, especially when he is a diabetic, is sufficiently serious that I believe it would have triggered a reasonably competent medical practitioner to direct his or her patient, suffering from such a debilitating wound, to give the appropriate opinion to see a doctor to have the said wound looked at. I do not believe that a medical practitioner of similar standing to Dr Benjamin would have been happy to merely accept the WhatsApp pictures and then inform the patient that all is well. The pictures shared by the plaintiff show that the wound is not well and taking into account his diabetes, this would have triggered a doctor to act and not merely say all is well.

[69] I also find that when the plaintiff was referred to Dr Kula in December for a second opinion, the Achilles sutures have since been exposed with no skin cover over the area. Dry gangrene was also apparent around the wound. This eventually led to the need to undertake further procedures with Dr Yeoh of Park Medical Center, The notes of Dr Kula and the actions of Dr Yeoh show that the wound had issues and that a reasonable doctor would have at least advised the plaintiff immediately as to the concerns that may arise from the wound. This neglect by Dr Benjamin to have the wound looked at earlier, led to the need to have the second surgery and the costs incurred by the plaintiff.

[70] I also find the suggestion that the plaintiff seek a second opinion and for him to consider all available options at that late stage in December 2019 unsafe and too late in the day. Dr Benjamin should have been vigilant about the condition of the wound and the health of the patient. As I have said earlier, Dr Benjamin is aware that the plaintiff has a history of diabetes and as he alleged, the said patient's control of his sugar level may not be optimal. Under those circumstances, Dr Benjamin should have given immediate advice even as early as 4 November 2019 to have the issue referred to other specialists or at least the matter be brought to the attention of a doctor for treatment.

A **[71]** I am aware that the plaintiff may have been constrained by his financial predicament. That does not absolve Dr Benjamin of his obligation to the patient. There is always the option of having the plaintiff referred to a government hospital for treatment. This should have been alerted and not left until December 2019 when the wound became necrosed and eventually
B needed a second surgery to repair the Achilles tendon as undertaken by Dr Yeoh.

[72] I also find that there was at least the option of undertaking a sural flap surgery even as early as November 2019. This was agreed to by the third
C defendant's expert. This option should have been explored by Dr Benjamin and the said option should have been shared with the plaintiff. The plaintiff should have been given adequate information in November 2019 as to the condition of his wound at the time and should have been told by Dr Benjamin that
D perhaps a sural flap surgery be performed.

[73] I am also aware that Dr Benjamin relies on the expert opinion of Dr Oomen George a/l TO George where he states that based on the documents made available to him, he believes that the 'manner in which Dr Benjamin
E George conducted himself with managing the wound was in accordance to the accepted principles of plastic and reconstructive surgery'.

[74] However, I put very little weight on the report provided by Dr Oomen George due to the failure of his counsel to file the necessary documents that
F were referred to by Dr Oomen in preparing the said report.

[75] As notified by plaintiff's counsel, Dr Benjamin's counsel had failed to disclose to this court following the directions filed given during case
G management. The crucial document concerning the medical report prepared by Dr Benjamin was relied on by Dr Oomen when he prepared the report and should have been disclosed at an early stage. This was only disclosed on the eve when the expert was about to present his opinion and only after the plaintiff had closed his case and after the other defendants had given evidence.

H

[76] He had also failed to disclose in his report that Dr Benjamin is acting as an expert witness in his case before the courts. These factors should have been disclosed from the outset to ensure that the reliability of the said opinion and the independence of the said witness is sacrosanct. This would have also
I enabled the plaintiff the opportunity to ascertain the veracity of the medical report prepared by Dr Benjamin, relied on by Dr Oomen, and would have enabled the plaintiff the opportunity to address the said report through an expert of his choice.

[77] I do take note that the plaintiff chose not to call any skin specialist to rebut the opinion of Dr Oomen. This does not mean that this court is bound to accept the opinion presented by Dr Oomen. I find that the failure to disclose Dr Oomen's reliance on Dr Benjamin's medical report and the failure to disclose the said document for the trial is so prejudicial that the said opinion cannot be relied upon or at the very least little weight be given to it on the issue of the care of the patient post-operation.

[78] I find support in the decision of the English Court of Appeal in *Griffiths v TUI UK Ltd* [2021] EWCA Civ 1442 where the court held that a trial judge is not bound to accept the evidence of an expert witness even if it has not been controverted by another expert on the said issue. It is the trial judge's duty to consider and assess the evidence of the expert and see whether the evidence in the report is sufficient to enable the party relying on it to meet the required standard of proof in the case at hand.

[79] In this case, due to the deficiencies in the said report, I do not accept the opinion of Dr Oomen on the issue of the standard of care expected from Dr Benjamin's operation especially the events occurring between November 2019 to January 2020.

[80] Even if I am wrong on the above, I would like to state specifically that what I find disturbing and the basis of liability of Dr Benjamin is his failure to provide all information to the plaintiff as to the condition of his wound and his failure to advise the plaintiff the steps he should have taken given the events occurring in November 2019 to January 2020.

[81] The way the plaintiff's condition was simply dealt with in WhatsApp messages and the failure to have the wound properly diagnosed or at the very least be brought to the attention of another doctor is unreasonable and falls short of the standard expected of a medical practitioner.

[82] I also find that the conduct of Dr Benjamin and his failure to ensure that the appropriate advice is given to the plaintiff and his failure to ensure all options are made available to the plaintiff, to ensure that he decides to undertake what he believed to be the best course of action to address his care at the material time, falls below the standard of care reasonably expected of a doctor of his standing.

[83] To summarise, I find that the evidence shows that his conduct, especially the events occurring after 1 November 2019, was unfortunately unreasonable and shows a lack of care for the plaintiff.

[84] This is further aggravated by the fact that Dr Benjamin now blames the

condition of the wound on the plaintiff. He alleges that the condition in which the plaintiff finds himself to be in is caused by his: (i) diabetes; (ii) his alleged failure to undertake continuous treatment for the wound due to his impecuniosity; and (iii) due to the plaintiff's failure to keep the wound intact at home.

[85] I find that this is unreasonable on the part of Dr Benjamin. I am aware that the plaintiff's budget may have burst, and he may have had difficulties financially to see Dr Benjamin or Dr Chan at the material time, but due to the potential severity of the wound, the condition it appears to be in, especially in November 2019, Dr Benjamin should have advised the plaintiff to immediately see a physician. At the very least, see a physician at a government clinic to ensure that the wound is taken care of.

[86] I also find it unreasonable for Dr Benjamin to have left the plaintiff in a lurch when he went on holiday at the material time and only chose to undertake consultation through WhatsApp messages. He should have advised the plaintiff to at least see Dr Chan or if the plaintiff is unable to see him, then consult a doctor at a government clinic or hospital. The injury as seen in the WhatsApp messages indicates to me that they are serious and warrant an inspection by a trained physician and not merely through WhatsApp.

[87] More so, when it is clear to me that Dr Benjamin is aware that the plaintiff is a diabetic. Care should be taken to ensure that this issue is addressed and that he is informed of the risk of the severity of the wound at the material time.

[88] Dr Benjamin should not have brushed this issue aside and not have advised the plaintiff of the potential worsening of the wound and the need to see a physician immediately. What is crucial is that the plaintiff be given the right to choose and decide based on appropriate information made available to him. See *Montgomery v Lanarkshire Health Board (General Medical Council intervening)* [2015] 2 All ER 1031.

[89] I agree with the plaintiff's argument that this is a continuing duty on the part of Dr Benjamin, and he had failed to discharge this to the best of his ability expected from a reasonably competent doctor. See *NKX (by his mother and litigation friend) v Barts Health NHS Trust* [2020] EWHC 828 (QB), *CNZ (suing by her father and litigation friend) v Royal United Hospitals Bath NHS Foundation Trust and another* [2023] EWHC 19 (KB) and *Webster (by his mother and litigation friend, Heather Butler) v Burton Hospitals NHS Foundation Trust (2017)* [2017] EWCA Civ 62.

Causation

[90] I also find that if not for the failure of Dr Benjamin to undertake appropriate care and not advise the plaintiff appropriately, the injury would not have been suffered by the plaintiff and he did not have to bear the surgery and incur part of the damages claimed herein.

[91] It is clear to me that on a balance of probability, Dr Benjamin's failure to exercise his duties appropriately caused or materially contributed to the injury suffered by the plaintiff. See *Wu Siew Ying t/a Fuh Lin Bud-Grafting Centre v Gunung Tunggal Quarry & Construction Sdn Bhd & Anor* [2011] 2 MLJ 1, *Bonnington Castings Ltd v Wardlaw* [1956] 1 All ER 615 and *Guan Soon Tin Mining Co v Wong Fook Kum* [1969] 1 MLJ 99.

[92] I note that the plaintiff is a diabetic. This pre-existing illness cannot absolve Dr Benjamin. It is part of our law that a tortfeasor will be required to compensate for any damages suffered by the innocent party even those that may arise due to the pre-existing weakness inherent to the said person. This is commonly referred to as the thin skull rule.

[93] I refer to *Sivakumaran & Ors v Yu Pan & Anor* [1995] 1 MLJ 12; [1994] 4 CLJ 1066, *Chung Lian Kok lwn South East Asia Insurance Bhd* [2011] MLJU 636; [2011] 1 LNS 980 and *Janagi a/p Nadarajah (joint estate administrator and dependent of Benedict a/l Thanilas, deceased) & Anor v Sjn Razali bin Budin & Ors* [2022] 8 MLJ 820; [2021] 10 CLJ 915.

[94] Therefore, Dr Benjamin is liable for the injuries caused to the plaintiff despite the inherent frailties of the said patient, Dr Benjamin is aware of the existing health issue suffered by the plaintiff. As such, the failure of Dr Benjamin to ensure that sufficient steps were taken to address the condition of the wound did cause the damage to the plaintiff. It is wrong for Dr Benjamin to now point to the plaintiff's pre-existing health issues to try to escape liability, I am of the opinion that the issue of causation is fulfilled in the circumstances of this case.

Foreseeability of damage

[95] I also agree with the plaintiff's argument that part of the damage claimed by him is foreseeable and not remote.

[96] The type of injury suffered, and part of the damages claimed by the plaintiff would have arisen naturally from the failure by Dr Benjamin to exercise care as elucidated earlier. The damages claimable will be addressed below.

[97] I refer to *Emeh v Kensington and Chelsea and Westminster Area Health Authority* [1984] 3 All ER 1044 and *Wisniewski v Central Manchester Health Authority* [1996] 7 Med LR 248.

Claim against Dr Chan

Alleged breach of duty of care — Did Dr Chan act in accordance with the accepted practice of a medical practitioner who is competent to practice within the area of practice?

[98] Regarding the claim against Dr Chan, I find that the plaintiff has failed to prove that the said doctor had acted in breach of his duty of care to the plaintiff and did not provide any advice or opinion to the plaintiff as to the other possible treatment available especially those suggested now by Dr Kuldip Singh Dhillon.

[99] I also find that Dr Chan did inform the plaintiff of the risk that may be involved in the treatment suggested by Dr Chan and the possible outcome of the surgery.

[100] I also find that Dr Chan did explain the procedure to the plaintiff and the possible risks that may arise from the said surgery as well as the possible alternatives that he could consider before the said operation was undertaken. This is in line with the consent form executed by the plaintiff dated 7 July 2019 where Dr Chan had written in detail the risks that are involved.

[101] I find that this shows that Dr Chan was meticulous and understood the need to explain the risk and factors to the plaintiff before the surgery was undertaken. I appreciate the plaintiff's contention that these were not explained in detail to him or that Dr Chan did not inform him of the risk factors that were involved.

[102] However, as pointed out by the plaintiff's counsel, this court must consider contemporaneous documents and should put more weight on these documents rather than recollections by witnesses alone. See *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229, *Ku Jia Shiuen (an infant suing through her mother and next friend, Tay Pei Hoon) & Anor v Government of Malaysia & Ors* [2013] 4 MLJ 108 and *Norazleen bt Mohammed Mustaffa v Dr Omar Md Isa & Anor* [2015] MLJU 2313; [2015] 4 CLJ 474.

[103] Therefore, I find that Dr Chan did undertake the appropriate steps to ensure that all relevant information and options were made available to the plaintiff before the treatment was undertaken. Dr Chan did not rush to surgery and did try to see whether the said treatment could be treated naturally.

[104] I note that the plaintiff contends that he was not told of all the risks involved in the suggested surgery by Dr Chan and the proposed treatment. I believe that the picture painted by the plaintiff is untrue and that the version of events suggested by Dr Chan is correct. The contemporaneous documents of Dr Chan as recorded in the consent form indicate to me that it is more likely than not that the risk factors and the options available to the plaintiff were explained with care by Dr Chan.

[105] Furthermore, I also find that it is more likely than not that the plaintiff had agreed to the surgery to ensure that he would have continued to enjoy an active lifestyle after the operation. The evidence before me shows that he was an active sportsman and wanted to ensure that his existing lifestyle continued after the operation.

[106] I also find that the treatment and surgery suggested and implemented by Dr Chan was based on an accepted practice by a specialist as seen in the opinion of Dr Gobinder Singh. I have considered both the opinions of Dr Kuldip Singh and Dr Gobinder Singh, and I find that the opinion of Dr Gobinder Singh is preferable and is consistent with the documents and contemporaneous documents before me.

[107] I also find that the opinion of Dr Gobinder Singh is preferable because of the condition of the patient, the fact that he had previously undertaken an operation of a similar nature and the potential risk and the dangers of the leg being limp if the operation was not undertaken. The opinion of Dr Gobinder Singh is also supported by contemporaneous medical literature to support the views and procedures adopted by Dr Chan.

[108] Furthermore, as pointed out by Dr Chan, it is worth repeating that it was the plaintiff who had wanted the surgery to ensure that he was able to undertake sports events. This is in line with his demand for a sports injury expert to attend to him. Dr Gobinder explained that surgery was the only viable option available because of his previous injury, previous operation at the same location and his need to undertake an active life after the operation. I accept the opinion of Dr Chan and Dr Gobinder as being valid and consistent with the evidence before me.

[109] I note that Dr Kuldip Singh suggests that the patient should not have been operated on. He opined that the patient's injury would have cured itself naturally if it had been treated conservatively without undertaking an operation. He also opined that Dr Chan did not advise the plaintiff not to undertake the operation and the possibility of treating the wound conservatively.

[110] I am however not convinced by the opinion suggested by Dr Kuldip Singh. I find that the opinion of Dr Gobinder Singh is detailed and is based on current medical practice as seen in the journals referred to by Dr Gobinder Singh. I also find that the opinion of Dr Gobinder is preferable as the injury suffered by the plaintiff is a recurring injury that had been earlier operated on and that the plaintiff wanted to continue his active lifestyle. Dr Gobinder's opinion is also meticulous and highlights the danger of limping if the injury is not operated on.

[111] I do note that the plaintiff's counsel contends that, as both experts agree that the plaintiff's diabetes posed a higher risk for the injury to be aggravated, Dr Benjamin should be concerned and should have not undertaken the operation. Learned counsel also opined that the condition of the plaintiff posed a greater risk and could have caused further aggravation to the condition of the patient if the surgery was undertaken. Therefore, he suggests that the opinion of Dr Kuldip should be preferred.

[112] I do not accept the contentions for the reasons said earlier. I believe Dr Chan did take all necessary precautions and did consider the risk that may arise as a result of the plaintiffs diabetes. The notes kept by Dr Chan indicate that he had considered the patient's existing health before he decided to undertake the operation. The fact that he had consulted the plaintiff's Endocrinologists before the operation to ensure that the sugar levels were acceptable also shows that he had considered this factor.

[113] Secondly, Dr Kuldip's opinion that Dr Chan did not notify the plaintiff of the options available to him is based on what was told to him by the plaintiff. His opinion did not state the contradictory evidence in the documentary evidence which shows that Dr Chan did inform the plaintiff of all risks and the options available to the plaintiff. In light of such contradictions, this court is inclined to believe what was contemporaneously written down and acknowledged by the plaintiff himself.

[114] I find that Dr Chan did take careful consideration of the risks and did notify the plaintiff of these issues. The consent form, duly executed by the plaintiff, dated 7 July 2019, indicates that the alternatives, risks, benefits, and potential side effects were explained by Dr Chan to the plaintiff. These risks were highlighted and recorded in the handwritten notes kept by Dr Chan in the consent form dated 7 July 2019. The consent form states that the risks of bleeding, infection, mortality, wound breakdown (high risks) and nerve/blood vessel injury were stated. I find that these notes indicate, on a balance of probabilities, that they were explained by Dr Chan to the plaintiff.

[115] I also reiterate that it was the plaintiff who wanted the surgery to ensure that he could undertake his active lifestyle.

[116] Therefore, I cannot accept the opinion of Dr Kuldip Sing in the circumstances of this case and I prefer the opinion of Dr Gobinder Singh as being correct. Dr Kuldip's opinion is contrary or at the very least inconsistent with contemporaneous documents kept by Dr Chan and the hospital.

[117] In the circumstances, I find that Dr Chan was not negligent as suggested by the plaintiff, His actions are in accordance with a practice accepted by a responsible body of medical men skilled in that particular art as seen in the opinion of Dr Gobinder Singh.

[118] I repeat that I do not accept the opinion of Dr Kuldip Singh as being correct based on the facts that arise in this case. I opine that Dr Chan's conduct, his clinical opinion, the operation and his care of the plaintiff post and pre-operation are in accordance with the accepted practice of a medical practitioner who is competent to practice within the area of practice professed by Dr Chan. He has not acted negligently in any way as suggested by the plaintiff and his counse.

[119] It is worth repeating that I have considered the opinion of both experts, I find that Dr Kuldip Singh's opinion as to whether Dr Chan had advised the plaintiff as to the risk of the operation and the alternatives available, is based on what was stated by the plaintiff to him at the time he was consulted to provide an opinion. I find that Dr Kuldip Singh had failed to consider the written notes and the consent form executed by the plaintiff before the operation.

[120] I find that these contemporaneous documents show that Dr Chan did take steps as required of a doctor to explain the risks and all relevant information before the operation was undertaken. Dr Chan did not breach any of his duties to the plaintiff despite the protestation by the plaintiff or his counsel.

[121] Regarding his post-operation treatment, I find that it is reasonable for Dr Chan to have referred the plaintiff to Dr Benjamin to undertake appropriate care for the wound. I find that this was in line with accepted medical opinion as seen in the opinion of Dr Gobinder Singh. It would be appropriate for the said treatment of the wound to be in the care of Dr Benjamin and for Dr Chan to trust the said specialist to take the appropriate care.

A **[122]** I find that after 19 July 2019, the plaintiff was under the care of Dr Benjamin, Dr Chan had rightly decided to have Dr Benjamin, who is the skin specialist, treat the plaintiff.

B **[123]** I do not accept the opinion of Dr Kuldip Singh who suggests that this should not be referred to a skin specialist and should be dealt with by Dr Chan himself. I again prefer the opinion of Dr Gobinder who agreed with Dr Chan's decision to refer the issue regarding the wound post-operation to Dr Benjamin in the circumstances of this case.

C **[124]** The evidence before me also shows that appropriate care was undertaken by Dr Chan when the plaintiff was hospitalised for post-operation and until he was released from the hospital, Thereafter, the plaintiff liaised substantially with Dr Benjamin, and it would have been prudent for the treatment of the wound to be in the care of Dr Benjamin the specialist in
D concern. The plaintiff only saw Dr Chan three times in August 2019 and only on 4 September 2019 and 20 November 2019. Thereafter, when the wound became necrosed and when the WhatsApp consultations were undertaken, the issues arising were not shared by Dr Benjamin with Dr Chan. Under those
E circumstances, this court opines that Dr Chan had acted reasonably following the standards expected of him.

[125] Based on the above, I find that Dr Chan has undertaken the care of the patient in accordance with the standards expected of a competent and
F reasonable medical practitioner who has similar expertise. I find that Dr Chan had taken all reasonable steps to advise the plaintiff of the alternatives and risks involved in the operation and taken care of the patient post-operation.

[126] I find that the records kept by Dr Chan and the nurses in attendance
G indicate that the wound was healing well whilst the plaintiff was in the hospital. The issue concerning the condition of the plaintiff only started when he had financial difficulties, and the plaintiffs care was undertaken by Dr Benjamin through WhatsApp.

H **[127]** In the circumstances, I cannot find liability on the part of Dr Chan. For reasons I have explained earlier, I find that Dr Benjamin did fall below the expected standards but only for the period of care identified earlier, after 22 October 2019.

I Alleged joint care

[128] I also find that the plaintiff had only consulted Dr Benjamin for the treatment of the wound after he had undertaken the debridement of the wound on 4 October 2019. The appointment with Dr Chan was not attended to by

the plaintiff. The plaintiff decided to only see Dr Benjamin. The plaintiff did not seek Dr Chan's opinion and communications were solely with Dr Benjamin.

[129] Dr Chan only came into the picture again after the wound became necrosed especially on 29 November 2019. It was at this juncture that Dr Benjamin decided to consult Dr Chan, where it was decided that the patient be referred to Dr Kula. Although I did find that Dr Benjamin was negligent for the reasons I stated above, I find that Dr Chan to be absolved of any blame for the events during this period as he was kept in the dark by Dr Benjamin and was not told of the condition of the wound by the plaintiff until it became too late. For the said reason, blame should be attributed to Dr Benjamin alone.

[130] I find that it would be wrong to put any blame for the events after 1 November 2019 on Dr Chan. As I said earlier, I also reiterate that the plaintiff chose to communicate and deal solely with Dr Benjamin.

[131] As I have highlighted earlier, Dr Chan had correctly decided that this matter be dealt with by Dr Benjamin, the expert on the area of skin and wound treatment. This view is shared by Dr Gobinder Singh.

[132] I reiterate that this is in line with accepted medical practice as seen in Dr Gobinder's written opinion as well as his testimony before me and is reasonable in the circumstances of this case.

[133] The issue of the treatment of the wound, the skin and even the need for any option of implementing soft tissue cover over the wound is best left to be decided by the specialist, Dr Benjamin. I find the decision to leave the said decision, as to how to deal with the wound, in the hands of Dr Benjamin to be correct and reasonable based on the standard of care expected of a reasonably competent doctor of similar standing.

[134] I therefore do not find that Dr Chan had breached any of his duty of care to the plaintiff either alone or jointly as suggested by the plaintiff.

Duty to advice and disclose risks

[135] I would like to address an issue that has been repeated by the plaintiffs counsel during trial and in his written submissions, it has been argued that there is a need to keep a detailed record of the clinical diagnosis, advice and the procedures undertaken on the patient.

[136] I agree generally with his views and that meticulous records kept by a doctor will help with the analysis of a claim and is an important contemporaneous document that may tilt a claim either in favour or against a doctor.

[137] However, this court must be circumspect with the level of detail expected of a doctor. This court must accept the realities of a medical practice. I opine this must be decided on the facts of each case. Nonetheless, I find that the notes kept by Dr Chan contain sufficient details expected from a competent doctor.

[138] In this case, I find that Dr Chan did record the risks and the factors that were brought to the attention of the plaintiff before the surgery was undertaken. As an example, I find that the consent form did record the relevant factors and issues posed by the plaintiff's injury. This indicates to me that he had addressed his mind to the issues raised by the plaintiff's counsel in this proceeding and did inform the plaintiff of those factors to enable him to decide.

[139] Therefore, I accept the position taken by Dr Chan and his counsel and find that he acted in accordance with the standards expected of a doctor as required by law as seen in the decision of the Federal Court in *Zulhasnimar bt Hasan Basri & Anor v Dr Kuppu Velumani P & Ors* [2017] 5 MLJ 438; [2017] 8 CLJ 605.

[140] Dr Chan had also kept sufficiently detailed records of the care he had given to the plaintiff. These records indicate that he had taken sufficient care and taken reasonable steps as expected of a competent medical practitioner.

[141] For the above reasons I find that Dr Chan did discharge his duties in 'accordance with a practice accepted by a responsible body of medical men skilled in that particular art'.

[142] As I said earlier, Dr Gobinder's opinion is detailed, consistent with the contemporaneous documents that were kept by the doctors as well as the nurses at the material time and are substantiated by current medical journals that were referred to by Dr Gobinder.

[143] I also find, as I have said earlier, the decision by Dr Chan to refer the care of the patient to Dr Benjamin, the skin specialist, is also in accordance with the practice accepted by medical professionals. After detailed consideration, I do not accept the opinion of Dr Kuldip Singh and I prefer the opinion of Dr Gobinder.

[144] For the above reasons, I dismiss the plaintiff's claim against Dr Chan. I do not believe that the plaintiff has proven his case against Dr Chan. I therefore dismiss the plaintiff's claim against Dr Chan.

Vicarious liability or non-delegable duty of the hospital

[145] I also do not find that the plaintiff has proven his claim against the hospital.

[146] I accept the plaintiff's argument that there are cases where a hospital may be held liable for the negligence of the medical practitioners despite these being categorised as independent contractors to the said medical facility.

[147] The evidence before shows that the actions of the two doctors, ie Dr Chan and Dr Benjamin are clinical judgments on the part of these doctors and do not fall within the category of cases where there may arise a non-delegable duty or vicarious liability on the hospital.

[148] Firstly, Dr Chan and Dr Benjamin are not employees of the hospital, and the hospital cannot direct or control the clinical opinions of these doctors when they advise or provide care to their patients.

[149] Secondly, the choice of doctor chosen by the plaintiff, when he was first attended to by the hospital staff was left solely to him. He was given another on-call doctor, Dr Thomas Vanniasingham, to choose from and decided to choose Dr Chan from the list of doctors who have an interest in sports injury.

[150] Finally, I do not find this duty of care owed by the hospital was breached even if such a duty existed as suggested by the plaintiff's counsel. The non-delegable duty is to ensure that the doctors appointed are competent and able to attend to the plaintiff's care. The defendants are competent doctors who can undertake the said task and as shown in the case of Dr Chan, such duties were not breached. Neither did the acts of the said doctors fall within the category of cases where the law imposes an obligation on the hospital for the conduct of the doctors.

[151] It was only the failure of Dr Benjamin in the exercise of his clinical duties that led to the damage suffered by the plaintiff. This does not fall within the category of cases where non-delegable duties arise and are expected of the hospital.

[152] The plaintiff has also not complained about the standard of care provided to him by any staff of the hospital or by the facilities provided therein. The cause of action is solely concerning the standard of care and the clinical

duties exercised by Dr Chan and Dr Benjamin and this surely does not fall within the category of cases recognised to impose either vicarious liability or impose a non-delegable duty on the hospital.

[153] For the above reasons, I dismiss the plaintiff's claim against the hospital.

PLEADINGS

[154] I note that the plaintiff contends that the defendants allegedly did not plead that they had informed the plaintiff of the risks arising from the surgery.

[155] After reviewing the pleadings filed, I find that the plaintiff's opinion is incorrect, I find that the pleadings show that the said defendants have denied the allegations made by the plaintiff in para 8 of the statement of claim and are therefore entitled to raise issues denying the allegations made therein.

[156] Even if I am wrong on the above, as the facts and evidence are before me, this court is entitled and should decide on the issues posed and the defences raised. I refer to *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331; [1995] 4 CLJ 283.

DAMAGES AGAINST DR BENJAMIN (D3)

[157] After considering the evidence before me I find that Dr Benjamin should be directed to pay the plaintiff the following:

(a) hospital and medical expenses — RM68,466.70;

(b) travel expenses — RM2,000;

(c) cost of a maid — RM2,400; and

(d) general damages — RM50,000.

[158] As I have found earlier, Dr Benjamin had failed to take appropriate care and failed to advise the plaintiff during the period starting in November 2019 when the wound deteriorated, and he should have taken immediate action or advised the plaintiff to see any doctor to address this situation.

[159] The claim of RM40,212.85 that was incurred for the operation in July 2019 was not caused by the action of Dr Benjamin and had arisen due to his injury earlier. Therefore, this sum is not claimable against Dr Benjamin.

[160] The claim for RM3,313.95 was for the medical treatment at Subang Jaya Medical Center for expenses in 2018 and did not arise because of Dr Benjamin's action or neglect. Therefore, this is not claimable.

[161] The claims for medical boots and crutches are also not supported by any documentary evidence and are therefore not claimable. A

[162] The only sums that this court could allow are the claims relating to the treatment at Parkcity Medical Centre, which is to the total sum of RM68,466.70, B

[163] I do not allow: (i) the travel expenses of RM20,000 for costs of travel to Park Medical Center; and (ii) the claim for rentals of wheelchair rentals for flights. There is no evidence to support such claims. These are mere averments on the part of the plaintiff. If he had incurred these substantial expenses surely the receipts and evidence of payments would have been produced by the plaintiff. C

[164] In this case, the plaintiff did not show the receipts paid for the costs of the rental of these wheelchairs as well as the flights allegedly undertaken by him during this period. D

[165] However, for travelling expenses to and from the hospital I find that RM2,000 is reasonable in the circumstances of this case despite having no documentary evidence to support the claim. I allow the said sum based on what would be a reasonable sum that may have been incurred for the said trips during the said period. E

F

[166] Regarding the value of care to the patient by his family members, since he claims he had been assisted by the maid employed, then he should not be overcompensated. The costs of the maid are allowed as it is reasonable.

[167] The claim for the loss of bonus is also not allowed as I find that to be speculative. The allocation of any bonus will depend on the performance of an employee and the performance of the employer in the particular year. This cannot be attributed automatically to the plaintiff and is therefore not claimable against Dr Benjamin. G

H

[168] I allow a claim for general damages for the injury suffered by the plaintiff to the sum of RM50,000. I have considered the pain and suffering, hardship, discomfort, and mental distress that is suffered by the plaintiff as well as his age, health, and condition of the plaintiff before the injury as compared to after the said injury. This is also to compensate the plaintiff for the numbness that he allegedly continues to suffer from the said injury. I have considered the nature of the injury, the time in which he had to suffer the pain, and the lifestyle of the plaintiff. I

[169] However, it would be wrong for this court to impose substantially higher sums as suggested by the plaintiff's counsel as the purpose of such damages is to compensate the plaintiff and not to penalise the defendant. I refer to *Sambaga Valli a/p KR Ponnusamy v Datuk Bandar Kuala Lumpur & Ors and another appeal* [2018] 1 MLJ 784.

[170] I also do not find any basis to impose any form of aggravated damages as the conduct of Dr Benjamin, despite being negligent in this case, does not show any circumstances that could be the basis for the imposition of such damages. I therefore reject any claim for aggravated damages against the said defendant.

[171] Therefore, the damages awarded to the plaintiff against Dr Benjamin is to the total sum of RM122,866.70, Interest on the sum of RM72,886.70 is to be at the rate of 4%pa from 25 August 2020 to the date of realisation of the said sum. Interest on the sum of RM50,000 to the rate of 5%pa from the date of judgment to the date of realisation.

COSTS

[172] I will now deal with the issue of costs.

[173] I find that this claim should not have been filed in the High Court even if one were to follow the estimates suggested by the plaintiff, which is substantially less than RM1m.

[174] As such, this claim should have been filed in the sessions court and for no apparent reason, counsel and their solicitors chose to file their claim before the High Court ignoring the clear demarcation of jurisdiction provided under the Subordinate Courts Act 1948 and the Courts of Judicature Act 1964.

[175] I also note that the defendants' solicitors should have applied for this claim to be heard in the appropriate jurisdiction considering the foreseeable damages, if any, that may be imposed by the court for the injuries claimed against them. The practice of filing all such claims before the High Court should be stopped to prevent waste of judicial time in the Superior Courts.

[176] This disconcerting state of affairs, of solicitors and counsel, ignoring the lower courts, without any legal and adequate basis, continues to this day. Claims that fall within the jurisdiction of the sessions courts and even the magistrate courts have been filed in the High Court. This practice should be stopped. Counsels for the defendants have also refused to take any steps to have this matter transferred to the appropriate court. I trust that in the future such steps will be taken to ensure that this is rectified.

[177] Therefore, I order costs to be subject to the scale provided for under O 59 r 3 of the Rules of Court 2012 of RM7,000 to be paid by Dr Benjamin to the plaintiff. The plaintiff is also directed to pay to the other defendants costs of RM7,000 each. This would have been the costs payable in the lower courts.

[178] These orders are subject to the required allocator.

ORDERS OF COURT

[179] Dr Benjamin (third defendant) is directed to pay the plaintiff the following:

(a) damages to the total sum of RM122,866.70;

(b) interest on the sum of RM72,886.70 is to be at the rate of 4%pa from 25 August 2020 to the date of realisation of the said sum;

(c) interest on the sum ofRM50,000 at the rate of 5%pa from the date of judgment to the date of realisation; and

(d) cost of RM7,000.

[180] Plaintiff is directed to pay the first and second defendants each cost of RM7,000.

[181] The costs above are subject to the allocator.

Plaintiff's claim against Dr Benjamin allowed; plaintiff's claim against hospital and Dr Chan dismissed with costs.

Reported by Dzulqarnain Ab Fatar